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7. Brokers (§ 11*)—Evidence as to Local Real Estate Market after Breach of Exclusive Agency Contract Held Inadmissible in Suit for Breach.—In a realty company's action for breach of an exclusive agency to sell decedent's realty, entered into before his death, where it appeared that decedent, after the execution of the contract, had himself sold the land to another, it was not error to exclude evidence as to the condition of the real estate market in the vicinity shortly after the alleged breach.

8. Trial (§ 191 (3)*)—Instruction Assuming Facts Testified to by Impeached Witness Held Erroneous.—In a realty company's action against an executor for breach of an exclusive agency contract made with decedent, it was error for the court to instruct on an assumption that the employment was for 12 months, where a witness testifying to that point was claimed by defendant to be impeached.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 731.]

9. Brokers (§ 11*)—Plaintiff, Suing for Breach of Exclusive Agency Contract, May Base Loss of Profits on Sale to Another.—In a realty company's action for breach of an exclusive agency contract for sale of realty based on a sale by the owner himself after the contract had been entered into, plaintiff could elect to base its loss of profits on the sale actually made by the owner.

Errors to Hustings Court of Petersburg.

Assumpsit by the Atlantic Coast Realty Company against Robertson's Executor. Judgment for plaintiff, and defendant brings error. Reversed.

Mann & Townsend, of Petersburg, and *C. V. Meredith*, of Richmond, for plaintiff in error.

Lassiter & Drewry, of Petersburg, and James Mann, of Norfolk, for defendant in error.

VIRGINIA RY. & POWER CO. v. CITY OF RICHMOND.

March 17, 1921.

[106 S. E. 529.]

1. Street Railroads (§ 32*)—Operation Evidence of Construction of Ordinance by Parties.—The operation by a traction company of its street cars over the tracks of another company under the terms of a city ordinance for so long as the two companies were separate corporations and for several years thereafter, with the consent of the city authorities, if not sufficient to establish estoppel to deny that the ordinance authorized such operation, is at least of weight as a con-

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

struction by the parties that the ordinance authorized such operation.

[Ed. Note.—For other cases, see 5 Va.-W. Va. Enc. Dig. 230.]

2. Street Railroads (§ 32*)—Ordinance Held to Authorize Operation Over Competitor's Tracks.—The Richmond ordinance of December 7, 1900, enacted at the urgent solicitation of a traction company, which, after reciting the provision of a competitor's franchise permitting the council to authorize the use of its tracks by the traction company, gave the traction company the right to operate its cars along the lines thereafter specified, specified certain tracks which the company was authorized to lay and connections it was to make, and required the cars operated thereunder to be operated according to the provisions of the traction company's franchise, clearly authorized the traction company to operate its cars over the competitor's tracks, though the subsections specifying the particular lines made no mention of the operation of cars.

[Ed. Note.—For other cases, see 12 Va.-W. Va. Enc. Dig. 837.]

3. Street Railroads (§ 18*)—Rule of Strict Construction of Franchise Not to Be Used to Defeat Public Rights.—The rule that a street railroad franchise is to be strictly construed so as not to convey any rights by implication which are not expressly granted is for the protection of the public, and is not to be used to defeat the public right to have the required service over the lines covered by the franchise.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 169.]

4. Street Railroads (§ 18*)—Strict Construction of Franchise Does Not Mean Strained or Unnatural Construction.—While a franchise is to be construed strictly against the company and in favor of the public, that does not mean that it is to be given a strained or unnatural construction which will defeat the manifest purpose of the grant.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 169.]

5. Street Railroads (§ 18*)—Right Necessarily Implied from Whole Ordinance Is Sufficiently Expressed.—Where the right of a street railroad company to operate cars over the lines specified in a city ordinance is necessarily implied from the whole ordinance, though not specifically mentioned in the provisions designating the lines to be constructed, the right is sufficiently expressed in the ordinance within the rule that a franchise gives only the rights expressed therein, and not those given only by implication.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 541, 542.]

6. Street Railroads (§ 66*)—Ordinance Held to Require Operation of Cars Over Named Route.—The Richmond ordinance of December 7th, 1900, granting to a traction company authority to connect with

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the tracks of a competitor and to operate its cars over such tracks, which also provided that the cars should be operated by the traction company in accordance with its franchise, requires the company to maintain over the route therein specified the service it was required to maintain by its franchise over the other routes.

7. Street Railroads (§ 68*)—Acceptance of Ordinance Creates Contract Which City Can Enforce.—The acceptance by a traction company of an ordinance authorizing and requiring it to operate cars over the tracks of its competitor creates a contract for the operation of such cars which the city can enforce.

[Ed. Note.—For other cases, see 12 Va.-W. Va. Enc. Dig. 836.]

8. Evidence (§ 20 (2)*)—No Judicial Notice of Effect of Operation of Cars.—On writ of error to a judgment imposing a fine on a street railroad company for discontinuing service on a certain route, the court cannot take judicial notice that the maintenance of service on that route would be unnecessary and would result in congestion of the traffic.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 613.]

9. Street Railroads (§ 68*)—Reasons for Repealing Service Ordinance Cannot Be Considered by Court.—On writ of error to a judgment fining a street railroad company for discontinuing service on a route, the fact that such service was of no benefit to the public, and that the operation of the cars thereon increased the congestion of the traffic, presents a good reason for the repeal of the ordinance requiring the service by the city council, but does not authorize the court to permit such discontinuance.

Error to Hustings Court of Richmond.

The Virginia Railway & Power Company was filed for discontinuing service on one of its routes in the City of Richmond without consent of the city council, and its brings error. Affirmed.

E. R. Williams, A. B. Guigon, and T. Justin Moore, all of Richmond, for plaintiff in error.

H. R. Pollard, of Richmond, for defendant in error.

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